Supreme Court, U.S.
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No. 07-105 JUL 26 2007

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In The

Supreme Court of the United States

JOHN THOLEN, et al.,

Petitioners,

v.

COUNTRYWIDE HOME LOANS,

Respondent.

On Petition For A Writ Of Certiorari To The Missouri Court Of Appeals, Western District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a dismissal of an appeal based upon a purported failure to comply with briefing requirements meant to make clear for both the opposing counsel and the appeals court the precise issue appealed is a deprivation of due process of law wherein no mention of the alleged error was made by opposing counsel, nor by the court nor by anyone else until well into the oral argument on the appeal, and where the point, due to its being the sole point on appeal and revolving around whether or not a party complied with each and every requirement of a statute could not be fairly said to be ambiguous in any manner.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner

Petitioners are John Tholen and Sue Tholen, individuals

Respondent

Respondent is Countrywide Home Loans, a corporation doing business nationwide but with headquarters in California.

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PETITION FOR A WRIT OF CERTIORARI

Plaintiffs John and Sue Tholen respectfully request that the Supreme Court grant certiorari to review the Judgment Entry of the Missouri Court of Appeals, Western District.

OPINIONS AND ORDERS BELOW

The opinion of the Missouri Court of Appeals is unreported. (App. 1-5). The Western District's Order denying the Petitioner's timely Motion for Rehearing or for Transfer to the Missouri Supreme Court (App. 8) is unreported. The Order of the Missouri Supreme Court denying the Application for Transfer (App. 9) is unreported at present.

JURISDICTION

The opinion of the Missouri Court of Appeals was entered January 23, 2007.

The Western District's Order denying the Petitioner's timely Motion for Rehearing or for Transfer to the Missouri Supreme Court was entered February 27, 2007. The Order of the Missouri Supreme Court denying the Application for Transfer was entered May 1, 2007.

This Court has jurisdiction under 28 U.S.C. §1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

This petition involves the Due Process Clause of the Fifth Amendment of the United States Constitution, U.S.

Constitutional Amendment V, made applicable to the States through the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. U.S. CONST. Amend. XIV, §1.

The Fifth Amendment, in pertinent part, states as follows:

> "No person shall . . . be deprived of life, liberty, or property without due process of law . . . "

U. S. CONST. Amend V.

The Due Process Clause, in pertinent part, states as follows:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. Amend. XIV, §1.

INTRODUCTION

This petition presents the Court with the opportunity to review how the application of technical rules of pleading in appellate courts can be used to deprive litigants of their constitutional rights and to resolve an issue of general interest and importance: namely, whether such rules should be recrafted so as to restrict them to solely being used as a tool to facilitate justice.

STATEMENT OF THE CASE

This case began as a suit to enforce the collection of a penalty allegedly due to Petitioners Tholens ("Tholens") based upon a Missouri statute (Mo. Rev. Stat. §443.130: App. 10) that provides, generally, that upon payment in full of a note and mortgage the mortgagee must quickly remove any recorded lien upon receipt of a demand letter or face a penalty. Countrywide Home Loans ("Countrywide" was the mortgagee). A lawsuit was filed, and both parties, after some discovery, filed Motions for Summary Judgment. The sole question in both motions was whether, within the confines of the statute a) the Petitioner had done the actions necessary to place the mortgagee in a position requiring it to remove the lien within a certain time, and b) whether the mortgagee did so remove the lien in a timely fashion.

The Trial Court upheld the motion of Countrywide and denied the motion of the Tholens.

Thus, the appeals case was unusual in its simplicity. Since it consisted solely of a dismissal based on Motions for Summary Judgment supported by affidavits, there were no issues of evidence, no issues of harmless versus reversible error, no issues as to whether objections or motions *in limine* were timely, no issues of curative admissibility, or jury instructions or behavior, or of argument, or anything else.

In short, there were no other rulings either made by the trial court or appealed by the Tholens.

There was only one matter that needed to be contended with on appeal: was the dismissal by summary judgment of the Tholens in the trial court below proper?

In turn, there was only one issue which held the key to the matter that needed to be resolved: were the Tholens entitled to a statutory penalty based upon their attempted showing of compliance with each and every requirement of Mo. Rev. Stat. §443.130 and the failure of Countrywide to so comply?

As part of its rules for the submission of briefs, the Missouri Supreme Court has propagated Rule 84.04(d) which states as follows:

> "**(d) Points Relied On**
>
> (1) Where the appellate court reviews the decision of a trial court, each point shall:
>
> (A) identify the trial court ruling or action that the appellant challenges;
>
> (B) state concisely the legal reasons for the appellant's claim of reversible error; and
>
> (C) explain in summary fashion why, in the context of the case, those legal reasons support the claim of reversible error.

The point shall be in substantially the following form: "The trial court erred in [*identify the challenged ruling or action*], because [*state the legal reasons for the claim of reversible error*], in that [*explain why the legal reasons, in the context of the case, support the claim of reversible error*]." (Emphasis in original.)

Before proceeding further, it must be kept in mind that, under Missouri law,

> " . . . (A) summary judgment is reviewed in the same manner as a court-tried or equity case and

> must be affirmed if, as a matter of law, the judgment is sustained on *any theory.*

Lines v. Mercantile Bank, 70 S.W.3d 676, 677 (Mo. App. S.D. 2002) (Emphasis supplied.)

Thus, although the Trial Court specified only that the letters did not put the Defendant on notice that a demand was being made based on the statute, Mo. Rev. Stat. §443.130 (App. 10) the Statute has a whole host of requirements which took some six pages to outline in the brief of the Tholens, in which those six pages are devoted to merely setting up the qualifications that had to be met by the Tholens before the Tholens could send out the demand letter asking that the lien be removed. A Plaintiff must then show the failure of the Defendant to comply in a timely manner.

Missouri courts had ruled that, in such a case, the court . . .

> " . . . must address the legal consequences of the facts contained in the record, and, if, under those facts, the (Plaintiffs) are not entitled to recover the penalty under section 443.130, the final judgment of the trial court (favoring the mortgagor) must be reversed." *Garr v. Countrywide*, 137 S.W.2d 457, 459 (Mo. Banc. 2004).

This means, of course, that the Plaintiffs have to show compliance with *all* of the facts that entitle them to a penalty, not just proper wording in a demand letter, within the context of the statute (Mo. Rev. Stat. §443.130).

This is because . . .

> "The statute is highly penal, must be *strictly construed*, and the plaintiff invoking it must *plead and prove* ***all*** *of the elemental facts." Wing*

v. Union Central Life, 155 Mo. App. 356, 137 S.W. 11, 12 (1911) (Emphasis supplied.)

It thus follows that for Plaintiff to have put in a Point Relied On, and to have argued only that the Trial Court erred in ruling that the letter did not put Defendant on notice would have a) failed to meet the burden set out for the §443.130 claimant by *Garr*, and b) would have ignored the appellate court's role, per *Lines, supra*, of being required to uphold the Trial Court's ruling on *any* grounds.

Therefore, the Plaintiffs had to brief and prove compliance with *all* of the requirements of §443.130. This is what they attempted to do in their brief. This is what they said that they were doing in their Point Relied On.

The Tholens filed their brief containing one sole point. (App. 13).

Whether or not there was complete compliance with §443.130 was the sole and precise matter that was briefed by the Appellants, and the sole and precise matter which was briefed by the Respondent, and the sole and precise matter which was argued at some length in the oral argument.

Reference to the Point Relied On shows that, in the body of the Point Relied On, there is reference to a "statute", but no reference to §443.130. It is, however, to be found in other places.

The statute, §443.130, was cited, and was the sole statute cited, in the Table of Contents. (App. 13).

§443.130, was cited, and was the sole statute cited, in the Table of Authorities.

§443.130, was cited, and was the sole statute cited, in the Jurisdictional Statement.

§443.130 was cited, and was the sole statute cited, in the Statement of Facts.

Finally, while not technically in the body of the Point Relied On, it was listed below said point (on the same page) as one of four cases/statutes that bore particular importance to the argument (as is required by local rules) and it was the only statute listed. (App. 13).

§443.130, was cited, and was the sole statute cited, in the first paragraph of the Tholens' Argument, and was even set out in its entirety therein.

In fact, the statute is even cited in the Point Relied On of Countrywide's own Brief.

Countrywide never, in that brief, made any statement that it did not understand what it needed to respond to. Neither did it do so in any written motion or otherwise, neither in writing, nor orally, nor at the oral argument. It made no assertion, contention, or insinuation that it did not understand the precise matters being "contended with" and to be "answered" to use the language of the opinion found at App. 4.

The Tholens then timely filed their Reply Brief.

A three-Judge panel was assigned the case.

Before the oral argument in December of 2006, at no time did anyone from the Court of Appeals, whether clerk or judge, either orally or in writing, ever suggest or insinuate that anyone was having trouble, or could have trouble, determining what the issue was, or that there was

any question of the "issues presented for resolution" as stated in the opinion's cite at App. 4.

At the oral argument, the panel engaged with both counsel in a spirited and lively debate. At no time did it indicate that it was confused as to what was being contended, or what the issues were. In fact, the panel asked pointed questions about the statute, §443.130, about the compliance of the Tholens with the statute, about the compliance by Countrywide of its obligation to remove the lien, and about numerous other aspects of the statute, betraying both a well-grounded understanding of the statute and the cases which had interpreted it, and a solid comprehension of the facts surrounding this particular case, all in startling contradiction to the cited basis for the denial of the point, that it didn't " . . . inform the court of the issues presented for resolution." (Memorandum, App. 4).

There was a single inquiry at the oral argument, after the Attorney for the Tholens had completed his first portion and before Countrywide began its response, as to whether anyone had raised an issue about the Point Relied On. The response was no.

Other than that single question, at no time before the ruling was received did anyone write, say, or communicate that the Point Relied On might have been insufficient to guide the debate.

The Memorandum Opinion of the Court of Appeals for the Western District was in the form of a summary, finding, in essence, two things: a) that the statute was not named in the Point Relied On, and b) that the Point Relied On did not state how, in the context of the case, the statute had been complied with. (App. 1-5).

The opinion does not allege or suggest that the statute is not prominently cited directly below the Point Relied On on the same page (App. 13), and in the Table of Contents. (App. 13). The opinion does not discuss the fact that the statute is set out in its entirety in the Appendices (App. 13 refers to where it is found in the appendices; App. 10 is a copy of the actual statute as it appeared), nor how these references, which must be seen if one opens the brief to scan the Points Relied On, could have failed to put the court on some sort of notice about what was being discussed. Neither does the opinion indicate how the constant citation in the brief and the setting out of the statute in its entirety could have failed to alert one as to the subject matter of the brief.

In other words, the opinion sets out the possible dangers of points that do not comply, but then fails to state that the court or the opponent was, in fact, unable to understand the issue here, and fails to explain in any reasonable fashion how the numerous apparitions of the statute can be comfortably ignored.

It is necessary at this point to discuss Missouri law as to the proffered reasons for adherence to these rules.

1) *Confusion to the Opponent*

"The purpose of the requirements . . . is to give notice to the party opponent of the precise matters that must be contended with and answered . . . " Opinion, App. 4, citing (*Bieri v. Gower*, 157 S.W.3d 264, 267 (Mo. App. S.D. 2005).

2) *Saving the Court From Interpreting Claims Differently*

Missouri Courts have held (*Bieri v. Gower*, 157 S.W.3d 264, 267 (Mo. App. S.D. 2005), that another reason for the

Points Relied On is so that the Court of Appeals should not have to search the argument portion of the brief to determine or clarify the nature of the claims, else it would risk "interpreting claims differently than the opponent" (Opinion App. 4, citing *Bieri* at 157 S.W.3d 267.)

3) *Risk of Deciding on Basis of Inadequate Briefing – Bad Precedent*

Bieri also stands for the proposition that inadequate briefing and advocacy could make for bad precedent. (App. 4, 5, citing *Bieri* at 157 S.W.3d 267.)

As applied in this case, these reasons are specious.

As to #1, the *identical* question was briefed and argued as the *sole* question in the trial court below. This issue on appeal was a refrain of the first. (Of perhaps more moment, as noted above, the opposing attorney never even alluded to not knowing what the precise matters to be contended with were).

As to #2, since the only issue was complete compliance with all of the requirements of the statute, (positive for Tholens, negative for Countrywide) there were only two possible decisions that the court could possibly have made: the actions of the Tholens and their demand letter, and the response of Countrywide, either did or did not come within the confines of the statute. It is hard to see how adding or subtracting from a point (or even a brief) could distract one from determining whether the statute had been complied with.

This brings us to #3: inadequate briefing and bad precedent. It is noteworthy that there is no remark by the court in its opinion as to any failing of the brief. (Nor a statement that the Respondent's brief was incomprehensible owing to the murky nature of Appellants' Point Relied On or brief.) Nor was there any remark made at oral

argument, nor orally or in writing at any time by the court, the opposing attorney, or anyone else as to asserted inadequacies of the *brief*. Only the Point Relied On was assailed.

The opposing attorney never suggested, in his brief, that he could not respond to an argument or assertion because the reasoning of the Tholen's brief was turgid.

As to the second part of #3, bad precedent, this, too, collapses of its own weight. The main defense was that the letters sent to Countrywide did not put Countrywide on notice. Thus, had the Appeals Court ruled specifically either way as to the language of the letter, the only precedent would be that these precise letters failed to put the lender on notice, because of the language (or lack thereof) in the letter. Thus, so long as parties sent a letter that was different in any way from the letters in the instant case, any precedent from this case would be immaterial.

While the proffered reasons would be transparently frivolous as applied to this case, curiously, it is worth noting that the Appeals panel, in its opinion, did not state that any of the reasons for which Rule 84.04 is so vigorously protected actually did apply in this case.

Assuming, though, for the moment that the failure to list the statute (Mo. Rev. Stat. §443.130) in the body Point Relied On was not fatal brings one to the next point raised by the court: that the point "does not identify in the context of the case how they demonstrated compliance with the statute. (App. 5).

For this, it will be necessary to discuss some further requirements of Rule 84.04.

Rule 84.04(d)(1)(C) (App. 3, 4, as cited in the Court of Appeals decision) requires that a Point Relied On be a "Summary".

The Court observed in its opinion that the Point Relied On did not "identify in the context of the case how they demonstrated compliance with the statute." (App. 5).

One must interpret this to mean that specific compliance needs to be set out, in a Point Relied On, as to each and every item of compliance, for reasons cited above.

It is true that this was not done in the Point Relied On. But there is a good reason.

The Plaintiffs' brief, in demonstrating such compliance started off at page 14 with elements of compliance A through H to even bring the Plaintiffs within the purview of the statute. All this had to be complied with before they could talk about sending the demand letter required: Plaintiffs had a debt supported by a deed of trust (and how this was so); Plaintiffs had been mortgagors and Defendant had been their mortgagee; Plaintiffs had paid off the entire debt and showed proof thereof; Plaintiffs had sent a "demand letter"; the letters had been sent to the "mortgagee, *cestui qui trust*, or assignee"; the letters had been sent by certified mail; the demand letter had been accompanied by "good and sufficient evidence that the debt secured by the deed of trust was satisfied with good funds"; the letter had shown evidence that the expense of filing and recording the release was advanced.

Then, and only then, if all of these requirements were fulfilled, so as to bring the Plaintiffs within the purview of the Statute (Mo. Rev. Stat. §430.130) by the actions they were required to take, did the burden shift to the Defendant

to do certain acts. The Plaintiffs then had to prove the failure by Defendant to properly act. All of this, too, was shown in pages 18 and 19 of the Appellant's brief.

Then, Plaintiffs went about demonstrating (pages 18-19) the time limits and requirements placed upon the Defendant: is Defendant a "person"? is it a mortgagee? did it respond within 15 business days? was there a tender of costs? was there delivery? was the delivery of a sufficient deed of release? how much is forfeited?

The next portion of the Plaintiffs' brief set out the following points: the language of the demand letter closely tracks the statute (a case law requirement); a direction to send the lien release elsewhere is irrelevant; Plaintiffs were the party who made "satisfaction"; the statute is not unconstitutional; and a previous release from another case has no application here.

The panel seems to be saying that *all* of this should have been set out in a Point Relied On.

The panel seems to ignore, however, that part of the rule which governs the Point Relied On says that the Appellant should " . . . explain *in a summary fashion* why, in the context of the case, those legal reasons support the claim of reversible error." Rule 84.04(d)(C). (Emphasis supplied).

The key word here is "summary."

Tholens submit that there is no reasonable way to explain, in a *summary* fashion, each and every support for the claim that the statute was complied with. Moreover, in creating a page-and-a-half or two-page Point Relied On, that does explain every act of compliance, the litigant then opens himself up to being dismissed for failing to "explain in a summary fashion."

In its Motion for Rehearing in the Court of Appeals, Tholens presented a prototype Point Relied On that sets out how the Plaintiffs demonstrated compliance with each and every requirement of the statute from purview to demand letter to failure to release. (App. 15, 16).

Tholens submit that the length of such a Point Relied On precludes such a Point Relied On from being a "summary", and thus would open up Appellants to attack for failure to comport with 84.04 in an entirely different way: conciseness.

Tholens further urge that, since it was the acknowledged burden of the Tholens to show compliance with all of the requirements of the statute, that such a tedious recitation, while full of detail, tells the reader no more about the sole issue of the case than the complained of Point: Tholens showed their compliance and the failure of Countrywide and so were entitled to a penalty.

Perhaps the most galling part of such a ruling is that, had the Attorney for Tholens been apprised of these purported shortcomings, there was a quick, simple, and easy remedy. (At least as to the positioning of the statute in the actual body of the Point.)

Thus, assuming that a rule requiring particular language in a particular part of a brief is constitutional, such rules should be recrafted so as to lessen the risks of depriving litigants of Procedural Due Process. One easy solution would be to require such rules to be in the form of requiring a pleading like a Motion for More Definite Statement as in ordinary civil procedure, so as to advise the Appellant that the court (and perhaps the opponent) is finding it difficult to determine what precise matters that must be contended with. The present Missouri rule, as are

possibly those of many other states, is particularly susceptible to abuse.

REASONS FOR GRANTING THE PETITION

THIS COURT SHOULD REVIEW THE LAWS OF APPELLATE COURTS, STATE AND FEDERAL, TO RESOLVE THE PROBLEM OF THE ABUSE OF TECHNICAL PROCEDURAL RULES IN APPELLATE COURTS WHICH DEPRIVE LITIGANTS OF DUE PROCESS WITHOUT PERMITTING SUCH LITIGANTS TO RECTIFY ANY PERCEIVED FAILINGS IN TECHNICAL REQUIREMENTS OF BRIEFS

THE DECISION BELOW DEPRIVED THE THOLENS OF FUNDAMENTAL RIGHTS WITHOUT ADVANCING A JUDICIAL PURPOSE

The chief problems with the above-referenced rule (Mo. Rev. Stat. 84.04) are that 1) it is not required to come early in the case, when, if the reasons given were true, (which is manifestly not the case herein) the problem could be rectified so as to avoid all of the negative potential consequences that are laid out by the Missouri opinions cited above; and 2) since it can come at the end of the case, where there is no possibility to discuss why it does not or should not apply, it can be used to avoid making a decision, to dismiss the case of an unpopular litigant, to aid the case of a popular litigant, to punish enemies personal or political, or to assist allies. Moreover, pity the poor Respondents who labor vainly to "contend with" an appeal that, unbeknownst to them, will not even be decided upon.

There does not seem to be a guarantee in the United States Constitution as to the availability of legal process in civil cases at the state level. But once a state decides

that it will provide such a procedure, it must be properly applied, or it violates Due Process.

Thus, a state that provides a means of appeal may not put limitations on it that are discriminatory, arbitrary, and totally unrelated to any possible state purpose. *Adams v. City of Colorado Springs*, 308 F. Supp. 1397 (D. Colo. 1970), judgment aff'd, 399 U.S. 901, 90 S. Ct. 2197, 26 L. Ed. 2d 555 (1970). While the Rule in question may have a sound genesis, in its present status, it is open to arbitrary use in a way totally unrelated to any conceivable judicial goal.

The minimum essential Due Process elements which are transferred to the states are notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Nguyen v. IBP*, 266 Kan. 580, 972 P.2d 747 (1999). While the Tholens did receive notice, the dismissal of their case without a review on the merits denied them of an opportunity to be heard.

When the opportunity to be heard is being revoked, then parties taking an appeal have a due process right to be given notice of its pending dismissal. *Ware v. Conner*, 178 W. Va. 560, 363 S.E.2d 245 (1987). This would permit a fair, open hearing as to issues of purported non-compliance with pleading rules. This was not done here.

While there are no fixed rules or requirements, the Fourteenth Amendment imposes on a state the standards necessary to insure that judicial proceedings are fundamentally fair. *Lassiter v. Department of Social Services of Durham County*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981). It cannot be seriously argued that the Kafkaesque decision in this case showed any badges of fundamental fairness.

What the decision did, in effect, is precluded the Tholens from any sort of meaningful access to the court system, which Due Process requires. *Nwaokocha v. Sadowski*, 369 F. Supp. 2d 362 (E.D. N.Y. 2005).

If something is not decided on the merits, and if the reasons for the dismissal are patently casuistic, it leads citizens to wonder what the real reasons are, and engenders speculation about judicial motives. The guaranty of justice without prejudice is meant to insure a fair and impartial trial, *Jones v. Pennsylvania R. Co.*, 353 Mo. 163, 182 S.W.2d 157 (Mo. 1944) but at a minimum, the process should satisfy at least the *appearance* of justice. *In re Murchison,* 349 U.S. 133, 75 S.Ct. 623, 99 L. Ed. 942 (1955).

The federal courts have examined similar cases. In *Palmer v. Miller*, 145 F.2d 926 (8th Cir. 1944), the Court allowed a technical failure to comply with the appellant court rules requiring objections to instructions to be quoted in statement of points relied upon in his brief. Because the failure was obviously inadvertent and resulted in no prejudice to the complaining party, it did not justify a refusal to consider the question presented. The court then made an admonition that would have been particularly *apropos*:

> "The defendant has called attention to the failure of the plaintiff in the 'Statement of Points Relied Upon' in his brief to quote his objections to the court's instructions of which he complains. This is, of course, a technical failure to comply with the Rule of this Court, but this failure is obviously inadvertent and has resulted in no prejudice to the defendant or to this Court. It would not justify a refusal to consider the question presented. *No court should become so enmeshed in*

> *its own rules as to be disabled from performing its proper function.*" *Id.* at 929.

In *Smith v. Barry*, 502 U.S. 244 (1992), the appellant, who was a state prisoner proceeding pro se, filed a brief within the time limits of the Rules, but did not file a separate notice of appeal as was also required by the rules. The Court of Appeals for the Fourth Circuit dismissed his appeal for want of jurisdiction.

The U.S. Supreme Court reversed and remanded *Smith v. Barry* for a determination of whether the brief was the "functional equivalent" of a notice of appeal. *Id.* at 250. The Court explained that the purpose of a notice of appeal is "to ensure that the filing provides sufficient notice to other parties and the courts," and therefore, "the notice afforded by a document, not the litigant's motivation in filing it, determines the document's sufficiency as a notice of appeal." *Id.* at 248. Regarding interpreting the rules of procedure in appellate practice, the Court further stated:

> "when papers are technically at variance with the letter of [the rules] a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the '*functional equivalent*' of what the rule requires." *Id.*

Although a pleading does not follow the exact letter of the rules, it still may be in compliance so long as the pleading is the "functional equivalent" of what the rule requires. Setting out the statute immediately below the Point Relied On where there is only one statute in the brief, is surely the functional equivalent of inserting it in the Point Relied On.

In *Hunter v. Underwood*, 362 F.3d 468 (8th Cir. 2004), on appeal from a lower court dismissal for failure to state

a claim, the Court held that the appellate's brief would not be stricken for various technical defects, such as failure to include appropriate references to the record and exceeding the page limit rule, where such defects were justified by the parties and record.

In *Massachusetts Bonding & Ins. Co. v. John R. Thompson Co.*, 88 F.2d 825 (8th Cir. 1937), where the appellant included in its brief its entire assignment of errors and argued all or substantially all of the errors assigned, the case would not be dismissed for noncompliance with rule requiring separate and particular statement of each assignment intended to be urged.

In *Indemnity Ins. Co. of North America v. Pioneer Val. Sav. Bank*, 343 F.2d 634 (8th Cir. 1965), in a case similar to this one, the Court of Appeals would consider questions raised by the appealing defendant in his statements of points on appeal, even though such points did not challenge any specific finding of fact, conclusion of law, or ruling on admissibility of evidence, where questions tendered appeared to have been addressed to trial court, record on which they were presented in Court of Appeals seemed complete, *and they had been already briefed and argued before the Court of Appeals.*

In *Kincade v. Mikles*, 144 F.2d 784 (8th Cir. 1944), although an alleged error was not presented by a proper statement of the point relied upon, the Circuit Court of Appeals still considered the *plain error apparent on the face of the record*, even though not assigned, to avoid a manifest miscarriage of justice. The Court held at *loc cit* 786:

> "The appellate court may, however, in its discretion consider a plain error apparent on the face of the record, even though not assigned, to avoid a

manifest miscarriage of justice." (Emphasis supplied.)

Therefore, even the failure of a party to bring up plain error may still be considered when apparent from the record, so that the Court can avoid a "manifest miscarriage of justice".

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Court of Appeals for the Western District of Missouri and determine what restrictions should be placed on the application of technical pleading rules in appellate courts.

Respectfully submitted,

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Counsel of Record for Petitioner

[SEAL]

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

JOHN P. THOLEN, ET UX, Appellants,	)	
v.	)	WD66705
COUNTRYWIDE HOME LOANS, INC.,	)	MEMORANDUM FILED: January 23, 2007
Respondent.	)	

MEMORANDUM OF REASONS FOR ORDER AFFIRMING PURSUANT TO RULE 84.16(b)

This memorandum is for the information of the parties and sets forth the reasons for the order affirming the judgment on appeal.

THIS STATEMENT DOES NOT CONSTITUTE A FORMAL OPINION OF THIS COURT. IT IS NOT UNIFORMLY AVAILABLE. IT SHALL NOT BE REPORTED, CITED, OR OTHERWISE USED IN UNRELATED CASES BEFORE THIS COURT OR ANY OTHER COURT. IN THE EVENT OF THE FILING OF A MOTION TO REHEAR OR TRANSFER TO THE SUPREME COURT, A COPY OF THIS MEMORANDUM SHALL BE ATTACHED TO ANY SUCH MOTION.

John and Sue Tholen[1] (the "Tholens") appeal the Jackson County Circuit Court's granting of summary judgment in favor of Countrywide Home Loans, Inc., d/b/a America's Wholesale Lender ("Countywide"). The Tholens

[1] John and Sue Tholen are married to one another.

present one point on appeal. As the sole point on appeal fails to comply with Rule 84.04, the point is denied.

This cause of action arose out of three mortgages on two pieces of real estate, wherein the Tholens were the mortgagors and Countrywide was the mortgagee. The mortgages were secured by Deeds of Trust. The Tholens obtained the payoff amounts for the three mortgages and paid Countrywide an amount equal to or greater than the amount needed to satisfy the three mortgages. The Tholens sent each payoff check to Countrywide with the following letter:

> Dear Sir/Madam,
>
> Enclosed, please find good and sufficient evidence that the debt secured by our deed of trust has now been satisfied. Funds have been advanced for the expense of filing and recording the deed of release (see payoff statement). We demand that you forward the release to Chicago Title Insurance Company, 5500 N. Oak Trafficway, Ste. 102, Kansas City, MO 64118.
>
> Sincerely,
>
> John P. Tholen
> Sue Ann Tholen

Each letter and corresponding cashier's check was sent on April 29, 2002, and was received by Countrywide on April 30, 2002.

The Deeds of Release for two of the mortgages were signed on May 7, 2002, and recorded on May 30, 2002. The Deed of Release for the third mortgage was signed on May 30, 2002, and recorded on June 11, 2002. None of the

Deeds of Release were delivered to either Chicago Title or the Tholens.

On September 9, 2004, the Tholens sent Countrywide a demand letter for penalties allegedly incurred by releasing the Deeds of Trust in an untimely fashion. The Tholens filed a petition on February 10, 2005, naming Countrywide as the defendant. They alleged they were entitled to ten percent of the amount of the three notes to be paid by Countrywide as a penalty. Both the Tholens and Countrywide filed motions for summary judgment, and the trial court granted Countrywide's motion. The Tholens' timely appeal followed.

The Tholens' point relied on fails to comply with the briefing requirements of Rule 84.04. In their sole point of appeal, the Tholens state:

> THE TRIAL COURT ERRED, AS A MATTER OF LAW, IN GRANTING THE MOTION FOR SUMMARY JUDGMENT OF THE DEFENDANT AND NOT GRANTING THE MOTION FOR SUMMARY JUDGMENT OF THE PLAINTIFFS IN THAT THE PLAINTIFFS HAD SHOWN THAT THEY CAME WITHIN THE PURVIEW OF THE STATUTE AND WERE ENTITLED TO A PENALTY BECAUSE THEY SHOWED THAT THEY HAD COMPLIED WITH ALL OF THE REQUIREMENTS OF THE STATUTE.

Rule 84.04(d)(1) states:

> **(d) Points Relied On.**
>
> (1) Where the appellate court reviews the decision of a trial court, each point shall:

> (A) identify the trial court ruling or action that the appellant challenges;
>
> (B) state concisely the legal reasons for the appellant's claim of reversible error; and
>
> (C) explain in a summary fashion why, in the context of the case, those legal reasons support the claim of reversible error.
>
> The point shall be in substantially the following form: "The trial court erred in [*identify the challenged ruling or action*], because [*state the legal reasons for the claim of reversible error*], in that [*explain why the legal reasons, in the context of the case, support the claim of reversible error*]."

"The requirement that the point relied on clearly state the contention on appeal is not simply a judicial word game or a matter of hypertechnicality on the part of appellate courts." ***Thummel v. King*, 570 S.W.2d 679, 686 (Mo. banc 1978)**. "The purpose of the requirements regarding points relied on is to give notice to the party opponent of the precise matters that must be contended with and answered and to inform the court of the issues presented for resolution." ***Bieri v. Gower*, 157 S.W.3d 264, 267 (Mo. App. S.D. 2005)**. If reviewing authority must resort to searching the argument portion of the brief or the record on appeal to determine or clarify the nature of the asserted claims, it may interpret the claims differently than the opponent or than was intended by the party asserting the claims. ***Id.*** "The appellate court's function is to examine trial court error asserted by a party, not to serve as an advocate for any party to an appeal." ***Id.*** "Where a brief fails to comply with the applicable rules and does not sufficiently advise the court of the contentions asserted and the merit thereof, 'the court is left with

the dilemma of deciding that case (and possibly establishing precedent for future cases) on the basis of inadequate briefing and advocacy or undertaking additional research and briefing to supply the deficiency.'" ***Id.*** **(quoting *Thummel*, 570 S.W.2d at 686).** "'Courts should not be asked or expected to assume such a role.'" ***Id.*** **(quoting *Thummel*, 570 S.W.2d at 686).**

The Tholens' point relied on does not identify which statute it is referencing or identify in the context of the case how they demonstrated compliance with the statute. ***See, e.g., Sherman v. Sherman*, 160 S.W.3d 381, 389 (Mo. App. W.D. 2004); *Finnical v. Finnical*, 81 S.W.3d 554, 559 (Mo. App. W.D. 2002); *Cohen v. Cohen*, 73 S.W.3d 39, 57-59 (Mo. App. W.D. 2002); *Crawford County Concerned Citizens v. Mo. Dep't of Natural Res.*, 51 S.W.3d 904, 907-09 (Mo. App. W.D. 2001); *Thomas v. Lloyd*, 17 S.W.3d 177, 189 (Mo. App. S.D. 2000).** At most it is an abstract statement of the law and "[a]bstract statements of the law, standing alone, do not comply with [Rule 84.04]." **Rule 84.04(d)(4).** As the point does not comply with Rule 84.04, it preserves nothing for appellate review. ***Crawford County Concerned Citizens*, 51 S.W.3d at 908.** Accordingly, the point is denied.

The judgment of the trial court is affirmed.

IN THE CIRCUIT COURT OF
JACKSON' COUNTY, MISSOURI
AT INDEPENDENCE

JOHN P. THOLEN, et. ux,	)	
Plaintiffs,	)	
	)	Case No.
vs.	)	0516-CV03644
COUNTRYWIDE HOME LOANS, INC.,	)	Division 16
	)	(Filed Mar. 9, 2006)
Defendant.	)	

JUDGMENT ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Before the court are Motions for Summary Judgment filed by plaintiffs and defendant pursuant to Rule 74.04(b).

In this litigation, plaintiffs seek a statutory penalty from defendant claiming defendant failed to provide plaintiffs with deed of trust releases on three loans, made to plaintiffs by defendant, within the 15-business day deadline established by §443.130 RSMo. [1996], after plaintiffs sent letters to defendant demanding the releases. [§443.130 was amended by the laws of 2004 but the new amendments became effective after the cause of action accrued in this case].

After review of the Court's file, the Motions for Summary Judgment, Suggestions filed in support thereof, the Statements of Uncontroverted Facts and the Reply Suggestions, all with documents and Affidavits attached thereto, and the Court being fully advised in the premises, the Court FINDS there is no genuine issue of material fact and that as a matter of law defendant should prevail

against plaintiffs on the Motions. The Court FINDS that defendant is entitled to Summary Judgment because plaintiffs' three separate demand letters failed to invoke the penalty provision of §443.130 and failed to put defendant on proper notice that plaintiffs were making statutory demands for releases pursuant to §443.130. Plaintiffs' letters fail to meet the standards established for said letters by the Missouri Supreme Court in the cases of *Brown v. First Horizon Home Loan Corp.*, 150 S.W.3d 287, 288 (Mo. *en banc* 2004) and *Garr v. Countrywide Home Loans, Inc.*, 137 S.W.3d 457, 460 (Mo. *en banc* 2004) and by the Missouri Court of Appeals, Eastern District in the case of *Glass v. First National Bank of St. Louis*, Case No. ED84118, Slip Opinion dated September 13, 2005.

ACCORDINGLY, this Court GRANTS defendants Motion for Summary Judgment and DENIES plaintiffs' Motion for Summary Judgment and hereby enters Judgment for defendant with costs to be paid by plaintiffs.

Dated this 10th day of February 2006.

/s/ Marco Roldan
Judge, Circuit Court of
Jackson County, Missouri

Missouri Court of Appeals
WESTERN DISTRICT

February 27, 2007

IMPORTANT NOTICE

To: All Attorneys of Record

Re: JOHN P THOLEN, ET UX, APPELLANTS

vs.

COUNTRYWIDE HOME LOANS, INC., RESPONDENT

WD66705

Please be advised that Appellant's motion for Rehearing is **OVERRULED** and motion for transfer to Supreme Court is **DENIED**. See Rule 83.04.

/s/ Terence G. Lord

Terence G. Lord
Clerk

cc: JAMES B JACKSON (816) 252-5319
RICHARD LOUIS MARTIN (816) 221-1044

In the Supreme Court of Missouri

SC88370
WD66705

May Session, 2007

John P. Tholen, et ux,
Appellants,

vs. (TRANSFER)

Countrywide Home Loans, Inc.,
Respondent.

Now at this day, on consideration of the appellants' application to transfer the above-entitled cause from the Missouri Court of Appeals, Western District, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI – Sct.

I, Thomas F. Simon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Sessions 2007, and on the 1st day of May, 2007, in the above-entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 1st day of May, 2007.

/s/ Thomas F. Simon _____Clerk

_____D.C.

MO ST 443.130
V.A.M.S. 443.130

VERNON'S ANNOTATED MISSOURI STATUTES
TITLE XXIX. OWNERSHIP AND
CONVEYANCE OF PROPERTY
CHAPTER 443. MORTGAGES, DEEDS OF TRUST AND
MORTGAGE BROKERS GENERAL PROVISIONS

Current through the End of the 2nd Regular Session
of the 91st General Assembly (2002)

443.130. Forfeiture for failing to satisfy

1. If any such person, thus receiving satisfaction, does not, within fifteen business days after request and tender of costs, deliver to the person making satisfaction a sufficient deed of release, such person shall forfeit to the party aggrieved ten percent upon the amount of the security instrument, absolutely, and any other damages such person may be able to prove such person has sustained, to be recovered in any court of competent jurisdiction. A business day is any day except Saturday, Sunday and legal holidays.

2. To qualify under this section, the mortgagor shall provide the request in the form of a demand letter to the mortgagee, cestui qui trust, or assignee by certified mail, return receipt requested. The letter shall include good and sufficient evidence that the debt secured by the deed of trust was satisfied with good funds, and the expense of filing and recording the release was advanced.

3. In any action against such person who fails to release the lien as provided in subsection 1 of this section, the plaintiff, or his attorney, shall prove at trial that the plaintiff notified the holder of the note by certified mail, return receipt requested.

CREDIT(S)

2000 Main Volume

(R.S.1939, § 3472. Amended by L.1994, H.B. No. 1312, § A; L.1996, H.B. No. 1432, § A, eff. June 25, 1996.)

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

No WD 66705

JOHN THOLEN et ux.

Appellant

v.

COUNTRYWIDE HOME LOANS, INC.

Respondents

APPEAL FROM THE CIRCUIT COURT
OF JACKSON COUNTY, MISSOURI
Honorable Marco Roldan Judge

BRIEF OF APPELLANT

(Filed July 5, 2006)

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ATTORNEYS FOR APPELLANTS

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* * *

POINT RELIED ON

THE TRIAL COURT ERRED, AS A MATTER OF LAW, IN GRANTING THE MOTION FOR SUMMARY JUDGEMENT OF THE DEFENDANT AND NOT GRANTING THE MOTION FOR SUMMARY JUDGEMENT OF THE PLAINTIFFS IN THAT THE PLAINTIFFS HAD SHOWN THAT THEY CAME WITHIN THE PURVIEW OF THE STATUTE AND WERE ENTITLED TO A PENALTY BECAUSE THEY SHOWED THAT THEY HAD COMPLIED WITH ALL OF THE REQUIREMENTS OF THE STATUTE

Black's Law Dictionary.

Brown v. First Horizon Lending 150 S.W. 3rd 287 (Mo. Banc 2004),

Garr v. Countrywide 137 S.W. 2d. 457 (Mo. Banc 2004)

Section 443.130 RSMo.

* * *

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

JOHN P. THOLEN, et al Appellant	)	
vs.	)	WD 66705
COUNTRYWIDE HOME LOANS, INC. Respondent	)	(Filed Feb. 5, 2007)

APPELLANT'S MOTION FOR REHEARING, OR, IN THE ALTERNATIVE, APPLICATION FOR TRANSFER TO THE SUPREME COURT

COME NOW Appellants, John P. Tholen and Sue Tholen, by and through their attorney, and pursuant to Rule 84.17 of Missouri Rules of Civil Procedure, hereby move the Court to set aside its decision and opinion herein and grant a rehearing or, in the alternative, respectfully move that this Court, pursuant to Rule 83.02 of the Missouri Rules of Civil Procedure, order the case transferred to the Missouri Supreme Court. In support of said Motion for Rehearing and Application for Transfer, Appellants state as follows:

Motion for Rehearing

Rehearing should be granted so as to permit the Court to reconsider the Panel's decision to not hear the merits of the case on the Panel's denial of the Appellants' appeal solely based upon an alleged failure to comply with Rule 84.04.

* * *

THE TRIAL COURT ERRED, AS A MATTER OF LAW, IN GRANTING THE MOTION FOR SUMMARY JUDGEMENT OF THE DEFENDANT AND NOT GRANTING THE MOTION FOR SUMMARY JUDGEMENT OF THE PLAINTIFFS BECAUSE THE PLAINTIFFS HAD SHOWN THAT THEY CAME WITHIN THE PURVIEW OF §443.130, RSMo. AND WERE ENTITLED TO A PENALTY IN THAT THEY SHOWED THAT THEY HAD COMPLIED WITH ALL OF THE REQUIREMENTS OF THE STATUTE, TO WIT: PLAINTIFFS SHOWED, IN THE CONTEXT OF THE CASE, THAT THEY WERE MORTGAGORS AND THE DEFENDANT WAS A MORTGAGEE, THAT PLAINTIFFS HAD PROVIDED A REQUEST IN THE FORM OF A DEMAND LETTER TO DEFENDANT MORTGAGEE BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED; FURTHER, PLAINTIFFS SHOWED THAT WHAT THERE WAS A DEED OF TRUST IN FAVOR OF DEFENDANT, AND THAT SUCH WAS A "DEBT", THAT THE DEMAND LETTER SENT TO DEFENDANT HAD INCLUDED GOOD AND SUFFICIENT EVIDENCE THAT THE SAID DEBT SO SECURED BY THE DEED OF TRUST HAD BEEN SATISFIED WITH GOOD FUNDS, AND, FURTHER THAT THE EXPENSE OF FILING AND RECORDING A RELEASE WAS ADVANCED TO THE DEFENDANT; FURTHER, THE PLAINTIFFS HAD SHOWN THAT THE DEFENDANT RECEIVED THE SATISFACTION, REQUEST, AND TENDER OF COSTS, AND THAT THE DEFENDANT FAILED, WITHIN FIFTEEN BUSINESS DAYS AFTER RECEIVING SUCH SATISFACTION, REQUEST, AND TENDER OF COSTS, FAILED TO DELIVER TO THE PERSONS MAKING SATISFACTION A SUFFICIENT DEED OF RELEASE, AND THAT THE PLAINTIFFS WERE THE PERSONS MAKING

SATISFACTION; FURTHER, THE PLAINTIFFS HAD SHOWN THAT THE HAD THEY DEFENDANT WAS A "PERSON", WITHIN THE PURVIEW OF THE ACT; THE PLAINTIFFS HAD FURTHER SHOWN THAT THE LANGUAGE OF THE REQUEST AND DEMAND LETTER THAT THEY HAD SENT TO THE DEFENDANT WAS IN LANGUAGE THAT CLOSELY TRACKED THE STATUTE, (§443.130 RSMo.), THUS PUTTING THE DEFENDANT ON NOTICE THAT A DEMAND PURSUANT TO SAID STATUTE WAS BEING MADE, AND THAT THEIR DIRECTION TO SEND THE RELEASE TO CHICAGO TITLE INSTEAD OF TO PLAINTIFFS WAS IRRELEVANT TO THE ISSUES IN THIS CASE; PLAINTIFFS HAD FURTHER SHOWN THAT THE STATUTE (§443.130 RSMo.) IS NOT UNCONSTITUTIONAL, AND THAT A RELEASE FROM A PREVIOUS CASE HAD NO BEARING ON THE CASE AT HAND.